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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of MICHELE and HERBERT VAN DORN.	
MICHELE VAN DORN, Appellant, v. HERBERT VAN DORN, Respondent.	D051926 (Super. Ct. No. DN102637)

APPEAL from an order after judgment of the Superior Court of San Diego County, Harry L. Powazek, Judge. Affirmed.

In this marital dissolution action the respondent Michele Van Dorn (Michele)[1] appeals from the family law court's order interpreting her and petitioner Herbert Van Dorn's (Herbert) division of his military retirement pension pursuant to a stipulated

1 Although Michele has remarried and is now using a different last name, we refer to her and her former husband by their first names as is customary in family law matters when the parties' pleadings share the same last name.

agreement attached and incorporated into the parties' judgment of dissolution of marriage in 1999. A year after the judgment was entered, James retired, exercising his right to waive part of his retirement pension to receive military disability benefits, which resulted in a reduction of the retirement benefits that would be paid to Michele. Although the parties had agreed in the stipulated attachment that Michele would receive her community property interest in Herbert's military pension "pursuant to the *Brown* Formula set forth in [*In re Marriage of Brown* (1976) 15 Cal.3d 838 (*Brown*)]," the agreement did not refer to disability benefits or contain any indemnity clause protecting Michele from the possibility that Herbert would become eligible for and receive such benefits.

In late December 2005, Michele filed an order to show cause (OSC) to divide Herbert's military pension, set arrearages, determine a payment plan, and for attorney fees and costs. After numerous filings and two hearings, the trial court denied Michele's request to award her 50 percent of the community interest in Herbert's military pension without reduction for any disability benefits, granted her request for arrearages for the portion of Herbert's military retirement not paid since the filing of her OSC, denied her request for arrearages prior to that time on grounds of laches, and denied her request for attorney fees and costs.

Michele challenges the court's decision, asserting that it abused its discretion by denying her claim for a division of Herbert's disability, by invoking laches to bar her claim for pension benefits before her January 2006 OSC filing, and by denying her claim for attorney fees and costs. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Herbert enlisted in the military on December 30, 1976. On October 29, 1977, he married Michele and they separated on October 29, 1997. The parties' filings for dissolution of marriage were consolidated and the parties stipulated at an OSC hearing in March 1998 that the final judgment would include, among other things, that "[Herbert's] retirement from his employment in the military is to be divided according to the *Brown* formula." On December 10, 1998, the parties reaffirmed such stipulation at a settlement conference. They also agreed that Herbert would pay Michele spousal support of $290 for a period of 10 months, which would then be reduced to $240 a month until April 1, 2000, when it would be reduced to zero, "with a mutual reservation over spousal support."

Judgment of dissolution was subsequently entered on April 30, 1999, and included the following provision regarding the parties' retirement benefits:

> "13. EMPLOYMENT BENEFITS-HUSBAND AND WIFE [¶] [*Brown, supra,* 15 Cal.3d 838]: the parties own as a community asset employment benefits earned by Husband and Wife as a result of their employment during the marriage. All of the following employment benefits, including without limitation retirement, pension or profit sharing plans shall be divided pursuant to the *Brown* Formula set forth in [*Brown, supra,* 15 Cal.3d 838], with date of marriage October 29, 1977, and date of separation October 29, 1997: [¶] A. Husband's Military Pension. [¶] B. Wife's Civil Service Pension."

Other than the express reservation of jurisdiction over spousal support, the judgment contained the standard form boilerplate provision that "[j]urisdiction is reserved to make other orders necessary to carry out this judgment."

At the time of Herbert's retirement from the military on May 31, 2000, he had "23 years and 5 months (or 281 months) of military service and had been married during the period of military service for 20 years (or 240 months)." In early April 2001, both Herbert and Michele executed a "Notarized Statement of the Parties Clarifying the Court Order Dividing Military Retired Pay," on a Defense Finance and Accounting Service's (DFAS) form, in which they "mutually agree[d] to divide [Herbert's] military retired pay, as property, in the following manner. . . . The former spouse [Michele] is entitled to receive: 47% of [Herbert's] disposable military retired pay." On April 25, 2001, the DFAS notified Herbert that it had received Michele's application, which included their notarized statements, for payment of her share of his retirement pay under the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408; USFSPA) and would start receiving payments in June 2001 directly from DFAS. Those payments stopped after Michele wrote to DFAS on March 18, 2003, requesting DFAS "stop [her] spousal support due to [the fact that she had remarried]."

On December 29, 2005,[2] Michele, who is now living in Texas, filed an OSC to divide both her pension and Herbert's military pension, set arrearages, determine a payment plan, and for attorney fees and costs. Michele declared that she was uncertain where Herbert was then living, but believed he had been retired for three or so years and was living in Georgia. She stated she had contacted DFAS in an effort to begin receiving

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[2] Even though the trial court's order states that the OSC was filed on January 11, 2006, that pleading was also file stamped December 29, 2005, which the parties have agreed on appeal was the actual filing date.

her portion of Herbert's military pension benefits, but had had no success and thus was forced to retain an attorney to initiate this proceeding. Together with her OSC and declaration, Michele lodged separate proposed blank orders for purposes of dividing both her and Herbert's pensions, and a request for production of documents

In his responsive pleading filed in May 2006, Herbert essentially asserted he had complied with the terms of the judgment of dissolution by authorizing DFAS to pay 47 percent of his military retirement to Michele and that she had voluntarily cancelled the checks she was receiving in the amount of $275 per month after she had remarried in 2003. Herbert, who had also remarried, thus requested the court issue a "fair and reasonable" order, i.e., one that waived any arrearages due to Michele's termination of his "voluntary payments."

The discovery lodged with the court revealed that Herbert had elected VA disability in lieu of his military retirement sometime after the dissolution judgment was entered and he retired in 2000. Discovery also showed that his gross retired pay available for distribution in 2001 was reduced to $558 from $1,793 as a result of his election.

Michele filed a reply, stating she had only agreed to terminate spousal support, not pension rights, when she sent her March 18, 2003 letter to DFAS. Before the December 18, 2006 hearing on the matter, she also filed several sets of supplemental briefing, citing *In re Marriage of Krempin* (1999) 70 Cal.App.4th 1008 (*Krempin*), which held that equitable relief is available to a spouse where his or her military spouse avoids payment of retirement benefits stipulated to in an agreement to a judgment of dissolution, by waiving them after entry of a dissolution judgment in favor of VA disability pay.

Michele argued that based on *Krempin*, the form language of the dissolution judgment in this case was sufficient to show that the parties intended to reserve jurisdiction in the event Herbert waived part of his military retirement even though there was no indemnity provision in the judgment. She asserted she should be awarded the amount of the military pension she would have received but for Herbert's election to receive VA disability, which reduced her community property interest and for payment of arrearages with interest since the time he first received any retirement benefits.

Michele also argued that laches was an invalid defense to her arrearages claim because Herbert had not shown any prejudice and he owed a fiduciary duty to her which he breached by "keeping all of the pension for himself." Based on records received from DFAS, she alleged Herbert owed her $76,926.31 in gross retirement arrearages (including the VA disability) plus interest through December 2006.

In his supplemental opposition, Herbert argued that *Krempin, supra*, 70 Cal.App.4th 1008, did not apply because the parties' stipulated judgment did not reserve jurisdiction over his military retired retainer pay; that Michele was entitled under the *Brown* time rule to only 42.7 percent of his military retired retainer pay, excluding any deductions for VA disability, which cannot be treated as community property under the reasoning of *Mansell v. Mansell* (1989) 490 U.S. 581 (*Mansell*); and that he should receive equitable relief regarding any retirement arrears because he had paid Michele 47 percent rather than 42.7 percent for several years and she had unilaterally stopped those payments in 2003.

At the hearing on the matter, the parties further argued their respective views on the applicability of *Krempin, supra,* 70 Cal.App.4th 1008, in this case and Michele also asserted Herbert had breached his fiduciary duty to her when he did not make sure she was receiving her full portion of his retirement pay. The court denied this latter assertion, finding Herbert was properly exercising his right to elect VA disability benefits rather than retirement and took the remaining matter under submission. The court noted it would set a review hearing regarding arrearages after it rendered a decision.

On December 27, 2006, the court issued a letter ruling, essentially denying Michele's request to divide Herbert's disability income because it was "unable to ascertain the parties' intent as to the division of [the military retirement plan] given the limited provision contained in their Judgment of Dissolution of Marriage [and it was] not convinced that the standard boiler plate provision as set forth in the Judgment of Dissolution of Marriage [was] sufficient and [specific enough] as contained in the *Krempin* provision." Regarding arrearages, the court asked counsel to meet and confer before a review hearing on that matter in March 2007. Michele's counsel was charged with preparing the order after hearing.

Before an order was prepared and filed, however, counsel for the parties met and conferred, agreeing several legal issues needed to be addressed before the review hearing on arrearages could be held. Michele's counsel notified the court by letter of such issues, requesting additional briefing, which was granted. After Herbert filed supplemental points and authorities on the additional issues, Michele's counsel asked for a continuance to respond to the supplemental briefing and to address *In re Marriage of Smith* (2007)

148 Cal.App.4th 1115 (*Smith*), a newly published case that might bear on the disposition of this case. The court continued the hearing to July 30, 2007, and set an additional briefing schedule.

In addition to Michele's supplemental points and authorities discussing the application of the holding in *Smith, supra,* 148 Cal.App.4th 1115, to her case, she clarified she was "not suing Herbert for breach of fiduciary duties[, but] arguing that the parties' fiduciary duties to each other concerning community property, which is the strong public policy of the state of California, takes precedence over any equitable defenses that Herbert asserts from any alleged delay [on her part] in seeking relief." Herbert's additional briefing distinguished the *Smith* case from his case because no specific provision for indemnification if the military retiree elected VA disability was included in the parties' judgment of dissolution of marriage as had been in the postjudgment order appealed from in *Smith*.

Before the July 30, 2007 hearing, Michele also lodged with the court numerous attorney fee bills sent to her by her counsel and filed her attorney's declaration for fees, an income and expense declaration, and another OSC regarding attorney fees and spousal support arrearages, claiming $9,168.51 in spousal support arrears plus interest. Her income and expense declaration showed she had a salary of $3,245 per month, her husband had an income of $3,000 per month, and she estimated Herbert's income was $6,771 per month.

At the hearing, Michele's counsel argued that *Smith, supra,* 148 Cal.App.4th 1115 rather than *Krempin, supra,* 70 Cal.App.4th 1008, should apply in this case because of

the strong community property presumption recognized in *Smith* that a pension should be divided "50/50" unless there is language that the parties had agreed the military spouse could reduce or eliminate the retirement assets by a waiver sometime after the judgment and because "there was no reservation of jurisdiction [s]o it fails under *Krempin*." Michele's counsel argued that her intention at the time of the judgment was that she get the full benefit of her bargain, which would be the "41 or 43 percent of whatever [Herbert] was going to be getting." Counsel conceded that the judgment was "quite clear that the money was to be divided by the *Brown* formula, and that while [Herbert] could take a disability pension under the law, . . . he cannot prejudice [Michele]." Herbert's counsel argued that *Krempin* and *Smith* were factually distinguishable from this case and that the intent of the parties at the time of the judgment was to divide the community property interest in Herbert's military retirement according to the *Brown* formula, which was exclusive of disability income pursuant to the USFSPA.

The court took the matter under submission and set another case management conference for purposes of dealing with arrears, which also included the issue of spousal support arrears.

On August 23, 2007, the court issued its extensive order after hearing, basically upholding its original decision to deny Michele's requests. It specifically noted that because its letter ruling had never been "reduced to an order," this order supplanted it as the order after hearing regarding the disposition of Herbert's military retirement. In the order, the court set out the background and procedural facts and the pertinent California and federal law regarding the disposition of military pensions in this state, including

Krempin, supra, 70 Cal.App.4th 1008, and *Smith, supra,* 148 Cal.App.4th 1115. In applying the law to the facts of this case, the court found "that while the parties were free to include a provision in the judgment that allows for indemnification in the event that [Herbert] waive[d] retirement benefits in favor of disability benefits, the parties did not do so."

The court also found that "this case has none of the hallmarks of the *Krempin* matter. Here, the parties did not specify a particular dollar amount and did not reserve jurisdiction 'to make such orders relating to these retirement benefits as necessary to carry out [an] agreement.' Instead, the parties merely specified that the military retirement would be divided according to the time rule set forth in [*Brown, supra,*] 15 Cal.3d 838, which is expressed as a fraction. The numerator of the fraction represents the length of service during marriage but before separation, and the denominator represents the employee's total length of service. The result is then divided in half. Of course, as is often the case, the denominator was unknown at time of judgment because [Herbert] had not yet retired. Thus, there is an implied reservation of jurisdiction to supply the denominator once it is known. That denominator is now known.[3] Although the court has jurisdiction to 'do the math' and finally divide the pension in accordance with the terms of the judgment, nothing in the judgment or in the evidence reserve[d] jurisdiction to the court to remake or revise the judgment to account for disability payments that may

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3 The parties agree that the length of service during marriage but before separation was 240 months. They further agree that the total length of service was 281 months. This yields a community interest in the retirement of 85.40 percent, and that [Michele's] share of this interest is 42.7 percent.

have had an effect on the actual dollar amount that [Michele] received, or was entitled to receive, as her share of [Herbert's] military retirement."

The court further found that *Smith, supra,* 148 Cal.App.4th 1115, did not change this result because it dealt with a postjudgment order, which provided for indemnification in the event of a waiver by the military spouse and the stipulated judgment in that case allowed for further proceedings to divide the military pension as evidenced by the parties' agreement that the wife's attorney prepare the necessary documents for such division. The court found that, unlike in *Smith,* no postjudgment proceeding and order was necessary to divide Herbert's military retirement in this case as it had already been divided "according to the *Brown Formula,* which has been interpreted to mean that the division will take place according to the time rule. [Citation.]"

In this regard, the court again explained that there had been "no reservation of jurisdiction [in the parties' stipulated judgment] to further divide [Herbert's] pension or to impose an indemnification provision. The pension has already been both characterized *and* divided according to the time rule. All that remain[ed] to be done is to supply the denominator, which is now known: 281 months." The court thus "ordered that a Qualified Domestic Relations Order [(QDRO)] be prepared and submitted to DFAS, specifying that [Michele] has a 42.7% interest in [Herbert's] military retired pay."

With regard to the issue of retirement arrears, the court awarded "arrearages, payable back to the date of the filing of [Michele's original OSC], January 11, 2006." It specifically declined to award arrearages for any earlier time because Michele had "not diligently pursued her rights in this regard. [Citation.]" The court ordered counsel to

again meet and confer on the issue of such arrearages, taking into account the more recent Concurrent Retirement Disability Program (CRDP), which returns all or part of waived pension payments depending upon the military member's disability rating, restoring such as a form of "disposable retired pay" that is divisible and payable to the former spouse.

Finally, the court ordered that "[e]ach party shall bear their own attorney's fees."

Michele timely appealed from the court's October 23, 2007 order.[4]

DISCUSSION

Michele essentially contends the family law court erred in applying the holdings of *Krempin, supra*, 70 Cal.App.4th 1008 and *Smith, supra*, 148 Cal.App.4th 1115 in this case. She specifically argues that because Herbert did not elect to waive a portion of his military retirement pay to receive VA disability benefits until after the dissolution judgment was entered, the *Krempin* rule applies to allow the trial court to order new payments to enforce what had been a proper division of community property and that the *Smith* case fully supports her position she is entitled to 50 percent of the community interest in Herbert's military pension before his unilateral waiver.

Michele also claims that Herbert breached his fiduciary duties to her by waiving part of his military retirement benefits in which she had a community interest, that there are no equitable defenses to this action, that the court improperly denied her request for attorney fees without considering Herbert's income and expense declaration, and that the

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4 Michele's appeal filed on October 29, 2007 was deemed timely because the Superior Court of San Diego was closed for filings during the week of October 23, 2007, due to wild fires.

court failed to address the issue of spousal support arrearages. Concerning this latter issue, Michele argues the matter should be remanded for further proceedings along with the issue of pension arrears for which the court ordered the parties to meet and confer.

As we explain, based on this record, we cannot find that the family law court erred or abused its discretion in rendering its decision on the matters encompassed by the order from which Michele appeals.

A. The Disability Pay Issue

Under the federal USFSPA, a state court may treat "disposable retired pay" of a member of the military as community property and determine its disposal in accordance with state law. (10 U.S.C. § 1408(c)(1); *Krempin, supra*, 70 Cal.App.4th at p. 1012.) The USFSPA defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled" less certain amounts, including amounts deducted from the retired pay as a result of a waiver of retired pay in order to receive military disability benefits. (10 U.S.C. § 1408(a)(4)(B); *Krempin, supra*, 70 Cal.App.4th at p. 1012.) In *Mansell*, the United States Supreme Court held that given the plain language in the USFSPA, retirement pay waived by the military retiree to receive disability benefits could *not* be treated by state courts as "property divisible upon divorce." (*Mansell, supra*, 490 U.S. at pp. 583, 587-589, 594-595.)

Since *Mansell*, state courts in California and other jurisdictions have looked "for creative solutions to prevent a former spouse from losing his or her interest in the military retirement as the result of unilateral action on the part of the military spouse" (*Smith, supra*, 148 Cal.App.4th at p. 1121), with several courts finding the holding in *Mansell*,

supra, 490 U.S. 581, inapplicable when there are no military disability payments to divide at the time of the dissolution judgment. (See *Krempin, supra*, 70 Cal.App.4th at pp. 1013-1015, 1021, and cases there cited.) In such cases, the courts have construed the military spouse's promise to divide his or her full retirement pay as creating a vested interest in the nonmilitary spouse, which cannot be altered by the military spouse's postjudgment decision to reduce the amount of retirement pay by taking disability benefits and held those rights could be enforced by a family law court without violating federal law. (*Id*. at pp. 1014-1015.) In those postjudgment waiver situations, the courts reasoned that the family law court was not dividing disability benefits in a dissolution judgment as proscribed by *Mansell*, but was only "*enforc[ing]* what had been a proper division of [retirement pay] marital property . . . ." (*Id.* at pp. 1015, italics added.)

The seminal case in California in this regard is *Krempin, supra*, 70 Cal.App.4th 1008. In *Krempin*, the stipulated judgment gave the nonmilitary spouse a 25 percent interest in the military spouse's retirement with monthly payments to commence when he retired. (*Id*. at pp. 1010-1011.) The marital settlement agreement incorporated into the judgment added: " 'The Court in the parties' dissolution action will reserve jurisdiction to make such orders relating to these retirement benefits as are necessary to carry out this agreement.' " (*Id*. at p. 1011.) After the military spouse retired, the parties filed another stipulation, which stated that "the defense accounting and finance center would begin direct payment to [the nonmilitary spouse] of her $327 monthly share of the pension in July 1994, and that [the military spouse] would pay that sum to [her] until those direct payments started." (*Ibid*.) Although the nonmilitary spouse initially received her share

of the pension as set forth in the stipulated judgment, she later began receiving a lesser amount because the military spouse had elected to receive disability benefits in lieu of a portion of his retirement pay, and then eventually she received no payments at all because the military spouse had elected to receive 100 percent disability. (*Ibid*.)

After finding *Mansell, supra,* 490 U.S. 581, did not prohibit it from enforcing a judgment dividing military retirement pay, the court in *Krempin* concluded that the issue of whether a former spouse should be compensated when his or her share of retirement pay is reduced by the military spouse's postjudgment waiver hinged mainly on "the scope of the judgment's reservation of jurisdiction and the agreements in the judgment and the postjudgment stipulation with respect to [the nonmilitary spouse's] payment. If the reservation of jurisdiction and the payment provisions can be interpreted to apply in the event of a waiver of retirement pay, the court has the power to grant the relief [the nonmilitary spouse] seeks." (*Krempin, supra,* 70 Cal.App.4th at p. 1018.)

As to this latter interpretation, the court in *Krempin* found that the ultimate resolution of such issue turned on whether at the time of the dissolution the parties intended to protect the nonmilitary spouse's share should the military spouse later elect to waive the retirement pay to which the nonmilitary spouse was entitled. (*Krempin, supra,* 70 Cal.App.4th at p. 1019.) If such intention were shown, the court could then exercise its equitable powers to impose a "resulting trust" on disability benefits to restore income lost to the nonmilitary spouse, provided such payments were satisfied "with other assets." (*Id*. at p. 1021.) Because the stipulated judgment before the court in *Krempin* was reasonably susceptible of either party's interpretation regarding their intent in that case,

the court remanded the matter to the family law court for further proceedings to take extrinsic evidence and resolve any conflicting factual issues on the parties' intent. (*Id*. at pp. 1019-1020.)

In *Smith*, the court reviewed a postjudgment order dividing a military spouse's retirement benefits, which required him to pay his former spouse a percentage of the VA disability benefits he would receive. (*Smith, supra*, 148 Cal.App.4th at p. 1118.) In doing so, the court in *Smith* construed the question under *Krempin, supra,* 70 Cal.App.4th 1008, as "whether the stipulated judgment contemplated the division of the retirement asset as it existed at the time of judgment or whether the parties had agreed that [the military spouse] could waive all or part of the retirement benefit and thereby unilaterally reduce the value of the asset to be divided." (*Smith, supra,* at p. 1122.)

The court's analysis in *Smith* noted that the parties had entered into a stipulated judgment, which characterized the military spouse's retirement as community property and provided it would be divided equally with the military spouse being given "credit for his separate interest for the period of time that he was in the armed services prior to marriage and the period of time subsequent to marriage." (*Smith, supra*, 148 Cal.App.4th at pp. 1122-1123.) The stipulated judgment further provided that a particular attorney (Edwin Schilling) would prepare the "necessary documents." (*Id*. at p. 1123.) Shilling subsequently submitted a proposed order to the family law court on behalf of the nonmilitary spouse, which specified that if the military spouse later elected to receive disability in lieu of retirement he would be obligated to pay the nonmilitary spouse the amount of retirement pay she would lose as a result of his waiver. (*Id*. at p. 1120.)

Although the military spouse in *Smith* objected to the proposed postjudgment order, the family law court adopted it and the military spouse appealed from that order, not from the stipulated judgment. (*Smith, supra,* 148 Cal.App.4th at pp. 1119-1120.) He contended that the postjudgment order was not contemplated by the judgment and that it was impermissible under federal law, arguing the parties had affirmatively agreed that he could reduce or eliminate the retirement asset by his voluntary waiver. (*Id*. at pp. 1120, 1123.) The court in *Smith* rejected the assertion that any such agreement was expressed in the stipulated judgment, finding that the "reference that Shilling would 'prepare necessary documents' reflect[ed] an understanding that postjudgment proceedings would be needed to implement the division set forth in the judgment." (*Id*. at p. 1123)

As in *Krempin, supra,* 70 Cal.App.4th 1008, the court in *Smith* also rejected the military spouse's contention the postjudgment order was in violation of *Mansell, supra,* 490 U.S. 581, because he had not been receiving disability payments at the time the postjudgment order was entered and so the trial court had not divided any retirement pay that had been waived. (*Smith, supra*, 148 Cal.App.4th at p. 1124.)

With these principles in mind, we turn to whether the family law judge properly applied the holdings of *Krempin, supra,* 70 Cal.App.4th 1008, and *Smith, supra,* 148 Cal.App.4th 1115, in this case, which admittedly appears at first blush to fall under the *Krempin* rule applicable to waivers of retirement pay after a dissolution judgment because Herbert elected to receive disability in lieu of a portion of his retirement pay after the parties' stipulated judgment was entered. Central to this determination is the question of whether under the terms of the stipulated judgment entered in April 1999, the

parties intended that Michele should receive an amount equal to her share of Herbert's full military retirement pay without a deduction for any disability benefits he would later elect to receive in lieu of his retirement pay. (*Krempin, supra*, at pp. 1019-1020) To the extent resolution of these issues requires interpretation of written documents on undisputed facts, we review the matter de novo, and to the extent it involves conflicting facts, we apply the deferential standard of review and draw all inferences in favor of the judgment. (*Id.* at p. 1020; *Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865-866, & fn. 2; *In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.)

Here, as noted above, the family law court carefully reviewed *Krempin*, *Smith* and the federal law regarding the division of military retirement and the subsequent reduction of such pay due to a military retiree electing to take disability benefits after a judgment of dissolution in light of the parties' extensive briefing, declarations and submitted documents. The court essentially determined that the equitable relief granted in *Krempin, supra,* 70 Cal.App.4th 1008 and *Smith, supra,*148 Cal.App.4th 1115, was not warranted in this case, finding the facts were distinguishable from the situations in both *Krempin* and *Smith,* and concluding there was nothing in the stipulated judgment or extrinsic evidence submitted by the parties to show that they intended at the time of the judgment to protect Michele's share of Herbert's retirement pay should he later elect to waive it for VA disability benefits. (*Krempin, supra*, at p. 1019.) Our review of the record supports the court's decision.

As the court properly found, there was no specific reservation of jurisdiction clause over the retirement benefits in this case as there had been in *Krempin, supra,* 70

Cal.App.4th 1008, which would automatically give it the authority to remake or revise the judgment to account for disability payments that may have had an effect on Michele's share of Herbert's military retirement. Moreover, the boiler plate reservation of jurisdiction clause contained in the form judgment did not provide any jurisdiction for the court to do other than enforce the military retirement provision contained in the stipulated judgment without some showing of intent that the parties had agreed at the time of the judgment Herbert could not unilaterally reduce the amount of his military pension which was to be calculated according to the time rule set forth in *Brown, supra,* 15 Cal.3d 838.

Unlike in *Krempin,* the judgment did not provide for a specific dollar amount Michele was to receive, which could have suggested an intent that Herbert's military pension could not be altered by a later waiver, but rather merely identified the formula by which the percentage of Herbert's pension was to be divided once he left military service. Nor was there any language that Herbert would make payments himself until the DFAS began payments as there had been in *Krempin,* which arguably would be supportive of finding an intent to provide Michele with a certain level of income. (See *Krempin, supra,* 70 Cal.App.4th at p. 1020.) Without any evidence of an intent to protect Michele's interest at a certain level, other than Michele's claim that the parties had intended she receive her full half of Herbert's total retirement regardless whether he later opted for disability benefits in lieu of any portion of his military retirement, the court correctly determined it only had jurisdiction to enforce the judgment by doing "the math" to supply

the denominator for the *Brown* formula and "finally divide the pension in accordance with the terms of the judgment. . . ."[5] (See *Krempin, supra*, 70 Cal.App.4th at p. 1018.)

Further, even though the stipulated judgment in *Smith* characterized the military pension as community property to be divided essentially according to the time rule as in this case, unlike in *Smith*, here there was no postjudgment order entered based on a provision in the stipulated judgment permitting further proceedings to divide the pension pursuant to "necessary documents," which in *Smith* eventually included an indemnification clause to protect the nonmilitary spouse in the military retirement. (See *Smith, supra*, 148 Cal.App.4th at pp. 1123-1124.) In this case there was no indemnity clause, which the trial court expressly found the parties were free to include in their judgment to protect Michele in the event Herbert waived any retirement benefits in favor of disability benefits, but did not do so.

Notably here instead of a postjudgment order as in *Smith*, there is a postjudgment "Notarized Statement of the Parties Clarifying the Court Order Dividing Military Retired Pay" which provides it is a percentage of Herbert's "disposable military retired pay" that is to be divided and paid to Michele. As noted above, under the USFSPA, disposable retired pay is the total monthly retired pay to which Herbert is entitled *less* the amount deducted from it as a result of his waiver to receive disability benefits. (10 U.S.C. § 1408(a)(4)(B).) Although this clarifying agreement by the parties came after the judgment was entered, it provides some evidence that the parties did not intend to

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5 Interestingly, Michele's counsel at the hearing on the continued matter, conceded her claim failed under *Krempin* and that only *Smith* applied.

indemnify Michele due to Herbert's election to take a portion of disability benefits in lieu of his full retirement since they did not include any provision in the clarification agreement regarding such contingency of waiver by Herbert at that time.

Thus, as the family law judge properly concluded, neither *Krempin, supra,* 70 Cal.App.4th 1008 or *Smith, supra,* 148 Cal.App.4th 1115, required Herbert's military pension to be divided in the manner Michele sought. To the extent, Michele now argues the court's ruling regarding the division of Herbert's disability benefits cannot stand because Herbert breached his fiduciary duty to her when he elected those benefits thereby reducing the amount of her vested rights in his retirement, the argument fails. Not only did Michele's counsel abandon such argument in the family law court, explaining Michele was only claiming that the parties' breach of fiduciary duties took precedence over any equitable defenses Herbert might assert regarding her alleged delay in seeking relief, but it ignores federal law, which precludes a state court from adjudicating the character of VA disability benefits in a marital dissolution judgment. (*Mansell, supra*, 490 U.S. at pp. 585-586, 589.) No error is shown in the court's order denying Michele's claim to divide Herbert's disability benefits.

B. Laches, Arrearages and Attorney Fees

Michele also contends the court abused its discretion by invoking the doctrine of laches to bar her claim for retirement arrears before her January 2006 OSC filing, by ordering the parties to meet and confer on the issue of those retirement arrears, by failing to address her OSC for spousal support arrearages, and by denying her request for attorney fees.

Preliminarily, we note that without objection the court set the matter over for determination of the amount of retirement arrearages due Michele since January 2006 and also for spousal support arrears. Because no arrearages' orders specifying the amounts due for either retirement or spousal support were entered or are included in the record on appeal, those issues are not ripe or before us for review.[6]

As for attorney fees and costs, although Michele claims she requested attorney fees based on "disparity of income," citing Family Code section 2030, the record reflects she merely asked for attorney fees and costs because she "would not have had to bring this action before the Court if Herbert had done what he was supposed to do about the retirement pension." Moreover, she complains for the first time on appeal that Herbert did not file an income and expense declaration, arguing no judge could reasonably make the order that each party would bear its own fees unless such declaration were filed.

A request for attorney fees and costs in a dissolution proceeding is within the sound discretion of the family law court and its decision will not be disturbed in the absence of a clear showing of abuse. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769; *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 630.) Here, the court

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6 Although the record contains Herbert's calculation of retirement arrearages filed after the order appealed from in this case, there is no stipulation of the parties regarding such amount or a formal court order setting the amount of retirement arrears. The record also reflects that the DFAS contacted Herbert in September 2007 with regard to an administrative error on the agency's part concerning paying Michele her portion of his retirement pay, which the DFAS states should have "restarted April 2005." The DFAS also stated it was conducting an audit to determine how much it would pay Michele from that time and was restarting paying her 47 percent of Herbert's retirement pay on September 2007. We presume this information will be considered at the time the parties meet and confer on the amount of retirement arrears due Michele.

had before it the original stipulated judgment that showed the parties' agreement that they would pay their own attorney fees and costs and the current income and expense statement filed by Michele, which showed her and her new husband's earnings and assets and expenses as well as estimating Herbert's gross income. The court also had before it the discovery documents from DFAS that reflected Herbert's military retirement pay and VA benefits. Because a court is not precluded from considering a new spouse's income when evaluating whether to award need-based attorney fees, and the documents in the record reflect a relative equality of incomes between the parties two families, we cannot say that "no judge could reasonably make the order made" denying Michele's request for attorney fees and costs. (*Sullivan, supra*, at p. 769.) No abuse of discretion is shown.

Nor can we find an abuse of discretion in the court's implied reliance on the doctrine of laches to deny Michele's claim for retirement arrears before the filing of her OSC in January 2006.

Under California law, the family law court has discretion to determine the appropriate means of enforcing a judgment, including taking the equities of the situation into account in exercising its discretion, which includes consideration of a laches defense. (*In re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, 1153-1154; superseded by statute on another point as stated in *In re Marriage of Fellows* (2006) 39 Cal.4th 179, 185.) "Laches is an equitable defense to the enforcement of stale claims. It may be applied where the complaining party has unreasonably delayed in the enforcement of a right, and where that party has either acquiesced in the adverse party's conduct or where the adverse party has suffered prejudice thereby that makes the granting of relief unfair or

inequitable." (*In re Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, 1359; superseded by statute on another point as stated in *Fellows*, *supra*, 39 Cal.4th at p. 185; *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359.) Although lack of "due diligence" is not a defense by itself to a claim for arrearages, it is a factor that may be "taken into account when examining the reasonableness of a delay." (*Dancy*, *supra*, 82 Cal.App.4th at pp. 1152-1153.) We review the court's ruling on a laches defense for abuse of discretion, drawing all reasonable inferences and resolving factual conflicts in favor of the judgment. (*In re Marriage of Garcia* (2003) 111 Cal.App.4th 140, 148; disapproved on another point in *Fellows, supra*, 39 Cal.4th at pp. 188, 190.)

Here, Michele's claim the court abused its discretion in using the doctrine of laches is premised on the argument there is no evidence in the record that Herbert altered his position in any manner or suffered any detriment by her purported delay in seeking arrearages from a division of his military pension. Although the court merely mentioned Michele's lack of diligence in pursuing her rights, citing footnote 3 in *In re Marriage of Walters* (1990) 220 Cal.App.3d 1062, 1068, a case finding the spouse there had waited over five years to pursue her military pension rights, as a reason for denying her arrears before she filed the OSC in this matter, the record contains sufficient other evidence to support a basis for the court applying the doctrine of laches in this case.

Here, the record shows Herbert retired in 2000 and elected VA disability at that time. When Michele began receiving his retirement benefits in 2001, she did not complain that she was only receiving his disposable retired pay. She then voluntarily stopped those payments in April 2003. Michele delayed until January 2006, a passage of

almost six years from when she first received her portion of Herbert's retirement pay, before filing her OSC complaining about the reduced payments due to the disability benefits and asking for arrears. From this evidence, the court could have easily found that Michele unreasonably delayed in asserting her rights to the pension benefits and also acquiesced in their nonpayment by expressly stopping them. Although Michele had called those benefits "spousal support" in her letter requesting that the payments stop, the court was free to disregard her characterization based on its review of the documents before it, which clearly showed she had been receiving pension benefits from DFAS and could infer she knew such fact based on the notarized statement she had signed before she started receiving them.

Although the mere passage of time is generally not sufficient to show prejudice, a court is permitted to examine how the circumstances of the party claiming prejudice has changed through the passage of time. (See *In re Marriage of Heistermann* (1991) 234 Cal.App.3d 1195, 1202; *Simon v. Simon* (1985) 165 Cal.App.3d 1044, 1049.) As noted above, by the time Michele filed her OSC in this case, Herbert had been retired six years. During that time, he had sold the parties' house in California, had moved several times, had remarried, had paid Michele's share of a student loan for one of their son's college tuition and was still paying on that loan. From this evidence, the court could have reasonably inferred that Herbert had altered his affairs based on the assumption he was entitled to receive his entire pension after Michele cancelled her share and that to require him to personally pay back those amounts at this time would prejudice him and be unfair.

In sum, on this record we cannot conclude that the court's ruling declining to award Michele arrearages of Herbert's military retirement pay for any date before the filing of her January 2006 OSC was a "palpable" abuse of discretion. (See *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1046.)

DISPOSITION

The order appealed from is affirmed. The parties shall bear their own costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.